Commonwealth of Massachusetts
State Ethics Commission

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John Massa
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PUBLIC ENFORCEMENT LETTER 99-1

Dear Mr. Massa:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that as a City of Lynn health inspector you violated the state conflict of interest law, General Laws c. 268A, by inspecting property that is managed by businesses for which you regularly serve papers as a constable. Based on the staff's inquiry (discussed below), the Commission voted on June 9, 1998 that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §23(b)(3).

For the reasons discussed below, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

I. Facts

1. You were a Lynn constable from approximately 1978 to 1996. Constables in Lynn are appointed by the mayor and approved by the city council. Lynn constables have not been designated "special" municipal employees.

2. As a constable you mainly served papers in landlord-tenant matters.[1/] You charged $10-25, depending on the type of notice, and $85 to $150 to evict someone, depending on how many hours the eviction took.

3. You estimate you earned $8,000 to $12,000 per year as a constable.

4. You did most of your constable work for two clients, International Realty ("IR") and Crowninshield Realty ("CS").

5. IR and CS are management companies. They are among the largest apartment management companies in Lynn. They do not own the apartments they manage.

6. You served papers as a constable for IR for more than five years ending in 1996.[2/] During that time, you received 90-95% of IR's business in the city. You estimate on average you earned approximately $6,000 per year from IR. You received virtually all of IR's constable business because you gave IR a volume discount.[3/]

7. You worked for CS for at least the five years prior to and including 1996.[4/] During that time, you also provid-ed CS with the same volume discount, and, in return received approximately one-half of their constable business. You estimate on average you earned approximately $3,000 per year from CS.

8. You have been a code inspector in the City of Lynn Health Department for 22 years. Your salary is $35,000 a year. Your office hours as a code inspector are Monday, Wednesday, Thursday, 8:30 a.m. to 4:30 p.m; Tuesday 8:30 A.M. to 8:00 P.M; Friday 8:00 A.M. to 12 P.M.

9. As a code inspector you are responsible for conducting apartment inspections. Most of the inspect-ions are apartment vacancy inspections.[5/] (The department conducts over 5,000 vacancy inspections each year.) You also conduct inspections when complaints are received from tenants. You are primarily responsible for inspecting property located in East Lynn near the ocean ("your district").

10. As a code inspector, you have been virtually the exclusive inspector for the four IR-managed apartment buildings in your district and occasionally you have inspected IR buildings outside of your district as well.
You have inspected IR units at a rate of 1-3 a month per apartment building.

11. You have conducted virtually all the code inspections for the CS properties located at 42 West Baltimore Street and 285 Lynn Shore Drive.

12. In 1996 four IR or CS tenants made code complaints to the Health Department following their receipt of an eviction notice delivered by you. You then conducted the inspection of the units.

13. You never disclosed to your supervisor, Lynn Health Department Director Gerald Carpinella, that you were inspecting units as to which you earlier served eviction notices for IR and/or CS. Nor did you disclose that you had an extensive constable relationship with IR and CS at the same time you were inspecting their properties. You also did not disclose that you were doing constable business in your own district.

14. Each year you file with the city clerk a letter stating that you are a constable and a health inspector. By letter to the city clerk dated July 11, 1996, you disclosed:

> As directed under §20(b) of conflict law, I am filing notice stating that I have been appointed constable while also being employed as a full-time municipal employee.

15. Carpinella has known for many years that some of his inspectors, including you, were also working as constables. Carpinella was concerned that inspectors would do constable work for landlords they regulated. In the 1980s, Carpinella discussed this concern with the inspectors, including you. The matter was referred to City Solicitor Nicolas Curuby who wrote a letter to Carpinella on July 6, 1987 addressing the issue. In his letter Curuby said that inspectors should not serve process in their code inspector districts; and, before serving papers

on any unit, the inspector should check to see if the department is involved with that unit.[6/] Carpinella made the letter available to all of the health inspectors on July 9, 1987, including you. Carpinella did not know that you served papers as a constable for IR and CS and also as a health agent inspected apartment units managed by IR and CS.

16. You state that the day after receiving the Curuby letter you spoke to Curuby. According to you, he told you that it would be okay to serve papers in your own district provided you did not serve on the same unit that you had inspected as a code inspector. You submitted a copy of the July 6, 1987 letter with your own handwriting in the upper right hand corner stating, "meeting 7-24-87, okay to serve in my area but never serve to tenant with order from health department." According to you, Curuby agreed to follow-up this oral advice with something in writing, but you never received anything in writing from Curuby. You did not disclose to Curuby that you had a steady, fairly high volume constable business relationship with IR and CS.

17. Curuby has no recollection of your claimed 1987 meeting with him. He states that he would not, however, have contradicted his 1987 letter without talking to Carpinella, and he has no recollection of talking about this any further with Carpinella. (Carpinella has no recollection of any such discussion.)

II. Discussion

Section 23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, knowing all of the facts, to conclude that anyone can improperly influence or unduly enjoy that person's favor in the performance of his official duties. This subsection's purpose is to deal with appearances of impropriety, and in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the municipal employee discloses in writing to his appointing authority (or if he does not have an appointing authority, files a written disclosure with the town or city clerk) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority must maintain that written disclosure as a public record. (If the employee is elected, his public disclosure to the town or city clerk must also be maintained as a public record.)

The Commission generally applies §23(b)(3) where an appearance arises that the integrity of a public official's action might be undermined by a private relationship or interest. *Flanagan*, 1996 SEC 757, 763. *Fact Sheet No. 1, "Avoiding 'Appearances' of Conflict of Interest*."

Clearly, if an inspector were receiving $2,000 or $3,000 a year in private fees from a landlord, he would probably have a bias in favor of that landlord when it comes time to inspect the landlord's property as a health inspector. The inspector would have to be concerned that an adverse inspection report by him might trigger a reduction of or even the entire loss of those fees. Performing such inspections under those circumstances cannot help but cause a reasonable person to conclude that the integrity of the public official's action might be undermined by the private fees he is receiving from the landlord. Consequently, absent a proper disclosure, such inspections would violate §23(b)(3).

The evidence indicates you inspected apartments on numerous occasions where those apartments were managed by either IR or CS, management companies with whom you had

arrangements to provide nearly all, or most of their constable business, and from each of which you received several thousand dollars each year for your constable services. For the reasons discussed above, such conduct would appear to violate §23(b)(3) because a reasonable person would conclude that IR or CS might unduly enjoy your favor in the performance of your official duties as an inspector.[7/]

In the Commission's view, a reasonable person, considering all of the facts, would give some weight to the fact that you do owe a fiduciary obligation to the city as a constable. Nevertheless, that same reasonable person, realistically reflecting on your receiving a substantial portion of your income from IR and CS, would conclude that you cannot help but have a bias in favor of those clients that might play a role in any dealings you would have with them as a health inspector. Consequently, there would be reasonable cause to believe such conduct violated §23(b)(3).

The point the Commission wants to emphasize is that inspectors have a particularly important role in protecting the public health and safety. It is essential that their objectivity, both in fact and through appearances, be maintained so that confidence in their inspections can be assured. Accordingly, no inspector should act as an inspector regarding any situation where he has a potentially compromising relationship with the party he is inspecting without *first* fully disclosing the relevant facts to his appointing authority.

There is no simple formula for identifying when these other relationships are sufficiently significant that they implicate §23(b)(3). Again, *see generally, Fact Sheet No. 1, supra*. For the purpose of giving guidance, however, the Commission advises that an inspector who in one year receives $100 or more in fees from someone he inspects must first disclose that fee relationship to his appointing authority or not inspect.[8/]

III. Disposition

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 per violation. The Commission chose to resolve this case with a public enforcement letter, rather than imposing a fine because there is no Commission precedent addressing whether a §23(b)(3) issue will arise when a public official acts officially with respect to someone with whom he has a significant constable fee arrangement; therefore, the Commission perceives the need to educate more than to punish in this area.

This matter is now closed.

DATE: August 20, 1998

1/ You most frequently served a so-called "14-day notice" which informs a tenant that eviction proceedings will begin if back rent is not paid within 14 days. If that notice is ignored, the attorney for the land-lord will typically next seek a court order giving the tenant 30 days to vacate, unless the back rent is paid during that time. You also served these orders. Finally

approximately once a month, you enforced an eviction order and moved the tenant and his furnishings out of an apartment

2/An IR employee initiated the arrangement.

3/You set your fees on average approximately 30 to 40% below what other constables usually charge.

4/A CS employee initiated the arrangement.

5/Apartment vacancy inspections are inspections to certify that a vacant apartment is suitable for habitation. These inspections are required by city ordinance.

6/The letter states, in part,

> To avoid possible conflict of interest, it is recommended that your inspectors be told that if they are asked to render [constable] services in their assigned district that they are not to accept the work. If after they make the preliminary notice, and the real property has been inspected by your office, none of the employees should accept further constable services.
>
> As you are aware, it is often the case, that when a notice to quit is made, the tenant comes to your office to ask for an inspection for possible violations. That is why the Constables in your office should make sure [of] the current status of the involved real property.

7/This appearance problem would be exacerbated whenever such an inspection involved the same IR or CS tenant to whom you had recently served papers as a constable, as was the case in the four instances described above. (Indeed, any such inspection, following so closely on the heels of your serving papers on the same tenant, would in and of itself create an appearance problem even if you did not receive a significant amount of fees from the company that managed that unit.) This appearance problem would also be exacerbated by your continuing to serve papers in your own inspection district after the city solicitor told you not to. (As discussed above, you maintain that the city solicitor orally amended his written prohibition to allow you to serve papers so long as there was nothing pending in the department regarding the unit. In the Commission's view the weight of the evidence does not support your claim; however, even if the city solicitor did amend his advice as you claim, the amended advice was not in writing, was not reviewed by the Commission, and was not based on any awareness by him of the volume of the constable business that you were doing with these two clients in your district.)

8/Your being a Lynn municipal employee as an inspector and also at the same time having been an appointed, paid Lynn constable, raises an issue under G.L.c. 268A, §20. Thus, §20 prohibits a municipal employee from having a financial interest in a contract with the same municipality. Your position as a Lynn constable would have given you a financial interest in a contract with Lynn. Where you were already a Lynn municipal employee as an inspector, that financial interest in a contract would appear to have violated §20. There are a number of exemptions in §20. The only one that could apply, however, is §20(b) which, among several other conditions, would have required that the availability of these constable positions be publicly noticed. That notice was not given. (Your filing a yearly disclosure with the city clerk of

your having a constable position, citing §20(b) did not satisfy the requirements of §20(b).)